No. 12,363

IN THE

United States Court of Appeals

For the Ninth Circuit

YOUNG BROTHERS, LIMITED, Claimant of the Tug "Kolo", her boats, engines, machinery, tackle, etc.,
Appellant,

vs.

JOHN CHO,
Appellee.

Appeal from the United States District Court, Territory of Hawaii.

BRIEF FOR APPELLANT.

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STATEMENT AS TO JURISDICTION.

This case involves a libel filed in Admiralty in the United States District Court for the Territory of Hawaii against the tug "Kolo", her boats, engines, machinery, tackle, etc., a vessel located in the waters of the Hawaiian Islands and within the jurisdiction of the District Court. The action was to recover for the loss of the sampan "Tenyo Maru", owned by the libelant, which loss occurred while the said sampan was being taken under tow by the tug "Kolo" between

the islands of Molokai and Oahu, Territory of Hawaii (R. 2-9). A decree was entered by the District Court against the tug on June 3, 1949 (R. 28-29). On June 18, 1949, a Notice of Appeal was given (R. 29), and this Appeal has been perfected in compliance with Section 2107 of Title 28, United States Code.

This case involves matters in Admiralty within the jurisdiction of the District Court of the Territory of Hawaii (Title 28, United States Code, Section 1333). This Court has jurisdiction of an appeal from the final decision of said District Court for the Territory of Hawaii under Title 28, United States Code, Sections 1291 and 1294.

STATEMENT OF THE CASE.

The appellant, Young Brothers, Limited, claimant and sole owner of the tug "Kolo", her boats, engines, machinery, tackle, etc., is, and at all relevant times has been, a Hawaiian corporation engaged in the tugboat business in the waters about the Hawaiian Islands.

The appellee, John Cho, is, and at all relevant times has been, a citizen of the United States, resident of Honolulu, Territory of Hawaii, and the owner of the sampan "Tenyo Maru". The sampan prior to its loss was used by the appellee in the business of commercial fishing (R. 74-75).

The Vice President of the claimant, whose principal office is located at Honolulu, Territory of Hawaii,

being informed on Sunday, April 3, 1948, that the libelant's sampan, the "Tenyo Maru", had grounded on a reef on the harbor of Kaunakakai, Island of Molokai, on the previous day, and assistance having been requested by the owner of the claimant, the claimant's tug "Kolo" was dispatched the following day, Monday, April 4, 1948, to the Island of Molokai to assist another tug of the claimant, the "Mahoe", in handling a pineapple barge at the Port of Kolo, Molokai, and also to look over the situation at Kaunakakai, and if possible without damaging the tug to tow the sampan off the reef and beach or dock her (R. 76, 216-217). There was no discussion on Sunday between the appellee and the claimant's officers concerning towage to Honolulu (R. 87, 204-205, 214-217).

On arriving at Kaunakakai on Monday, the tugmaster of the "Kolo" found the tidal conditions were not favorable to operations on that day (R. 132). The following morning, the tug "Kolo" and the claimant's tug "Mahoe", the latter a larger vessel (the "Mahoe" being a 125-foot tug, 750 horsepower, crew of thirteen, the "Kolo" a 65-foot vessel, 250 horsepower, crew of three (R. 233)), arrived at Kaunakakai, and the captain of the "Mahoe", being the senior boat captain in the Port, took charge of the operation of removing the sampan from the reef (R. 132-134, 230). A discussion was had between the captain of the "Mohoe" and the appellee, during the course of which it was revealed that the sampan carried no insurance. The appellee, asking the cost of towage from the reef, the master of the "Mahoe" advised him to call the ap-

pellant's office in Honolulu. Two telephone calls were necessary to get the desired information (R. 226-229, 253-254). A tentative figure was given for the removal of the sampan, but no agreement was reached, it being stated by the appellant's General Manager that when the vessel was taken off the reef, a settlement could be arranged (R. 217, 254).

That afternoon, with the use of both tugs, the sampan was freed from the reef and brought in and tied up to the pier at Kaunakakai (R. 120). She had three to five feet of water in her when she was docked, and a gasoline pump worked, at least intermittently, during the night to keep her afloat (R. 59-61, 80). In addition a bridle was run under her from the pier to the "Kolo", which was tied outboard of her. The bridle was a precaution against the sampan sinking during the night (R. 136).

An inspection of the sampan revealed damage to her hull below the water line in the form of a tear or rip about a foot and a half long and approximately three inches wide, which had the appearance of a plank having been torn out (R. 61). The hull being in the water and water being inside her, she could not be closely examined for any further damage, and no soundings of the entire sampan were apparently made (R. 62, 121). Attempts at patching the hole, both from the inside and the outside, proved unsuccessful because of the location of the tear and the weight of the vessel (R. 54-55, 78, 108). The rudder and propeller were also found to be damaged (R. 232-233).

After the sampan was tied up at the pier that afternoon, a discussion was had between the tug master of the "Mahoe" and the appellee in which the latter made inquiry concerning towage to Honolulu. In answer, the appellee was advised that authorization for such a tow would have to come from the appellant's office in Honolulu (R. 233). The "Mahoe" left the Port shortly after this discussion (R. 243).

On the following morning the appellee and the master of the "Kolo", having received no additional instructions or authorization from the claimant's Honolulu office regarding the tow to Honolulu, the master of the "Kolo" undertook to tow the disabled sampan from the Port of Kaunakakai to the Port of Honolulu, a distance of some thirty sea miles (R. 108, 127-128). No repairs had been effected on the bottom at the time of the commencement of the tow, beyond the fact that a thirty-five gallon drum was lashed to the port side of the stern (R. 81).

The sampan's crew of three members was left aboard to man the pumps, which consisted of a gasoline and a hand pump (R. 66). When some fifteen miles from Kaunakakai, in the channel between the Island of Molokai and Oahu, more water was taken into the sampan than the pumps were able to handle, and in a period of approximately one-half an hour the sampan lowered in the water to a point where her decks were awash and only her cabin and bow projected above the water (R. 56-57, 66-69, 123-125, 142-145). At this point, the master of the "Kolo" cut the tow line, circled

about and picked up the crew members who had jumped over the side, and left for the Port of Honolulu.

According to the master of the sampan, the vessel was taking in more water than the pumps could handle prior to the gasoline pump being put out of operation by the spray. No signal was given to the tug, however, until half an hour after the gasoline pump died (R. 66-69). According to the master of the tug, periodic signals were given that everything was all right. The sampan rapidly submerged, however, before any distress signal was given, and then the only signal was from the crew that the tug go back and pick them up (R. 143).

At this time, according to the tug master, the entire main deck was awash, part of the cabin was submerged, and the bow was projected out of the water about four feet (R. 143-145). The waves in the channel were four to five feet high (R. 126).

The sampan had been built in 1921, and acquired by the appellee in 1946 (R. 184-185). She had been given a major repair job in 1945, which included among other things repairs to the sides and bottom. She was thereafter put in the yard for such minor repairs as might have been required on an average of every three to five months (R. 173, 184-185). Evidence was introduced to show that while sampans have been reported to have sunk (R. 201), such an occurrence was rare because of the peculiar construction of this type of vessel (R. 198). While expert testimony was received

that a sampan in the condition of the "Tenyo Maru" at the time that the tow line was cut would not normally sink, it could possibly have done so, and the seaworthiness of the vessel could be determined only after an inspection (R. 198, 200). Likewise expert testimony was received establishing that any determination as to whether a wooden vessel of this type would sink would depend upon the buoyancy of the wood in her, which in turn could be determined only by lengthy tests, and that a ship in the condition of this sampan might have had a buoyancy so low that the vessel would sink (R. 312, 322-327).

The value of the sampan prior to her grounding was estimated to be at $8,000.00 to $9,000.00. It was likewise testified that a hull repair job necessitated by the grounding on the reef would cost approximately $650.00. This estimate was based upon merely the repair of the fractured skin on a break of about one and a half feet by three inches. It did not include, and no estimate was given, as to the repair cost for replacing fractured ribs or plankings, or for the costs of engine repairs as the result of inundation or for rudder, propeller and shaft repairs or replacement (R. 191-197, 199-200).

On these facts, the Court found the tug "Kolo" solely liable for the loss of the sampan, in that the tug master cut the towline and left the sampan adrift in a condition where it could have been towed into port. On the basis of these findings, the Court awarded damages in the sum of $8,000.00, together with interest and costs, or a total sum of $8,609.12, against the tug

"Kolo". From this decree this appeal is taken (R. 29, 35).

QUESTIONS OF LAW INVOLVED.

1. Can a libel *in rem* be maintained against a tug on a cause of action sounding in tort arising out of a towage agreement entered into by the master of the tug, the tug master lacking the authority of the owner so to enter into the agreement, the circumstances being such that the libelant, owner of the tug, knew, or should have known, of the master's lack of authority?

2. Does the cutting of a tow line by a tug master constitute negligence as a matter of law where the towed vessel is rapidly sinking, appears to be on the verge of completely submerging, where the question as to whether it will sink depends upon the amount of negative buoyancy in its wood structure, and where the safety of the tug would be jeopardized by the sudden foundering of the tow?

3. Assuming, without admitting, that the answers to the previous questions are in the affirmative, is the loss of the tow the sole responsibility of the tug, where the unseaworthy condition of the tow was known both to the owner of the tow and to the tug master, the tow was inadequately equipped for the voyage, the tow gave no adequate warning to the tug that it was flooding, and the apparent foundering of the tow was due to its unseaworthy condition, and no affirmative steps were taken by the master of the tow to prevent her abandonment?

SPECIFICATION OF ERRORS RELIED ON.

1. That the District Court erred in rendering and entering its findings of fact and conclusions of law herein dated June 3, 1949 (R. 35);

2. That the District Court erred in rendering and entering its final decree herein dated June 3, 1949 (R. 35);

3. That the District Court erred in holding and deciding that the tug "Kolo" was liable *in rem* for the loss of the sampan "Tenyo Maru" under the facts of the case (R. 35);

4. That the District Court erred in not holding and deciding that the Master of the tug "Kolo", being without authority to take the tow of the sampan "Tenyo Maru" and such lack of authority being known to the libelant-appellee, owner of the Sampan "Tenyo Maru", or such knowledge being imputable to him, the Tug "Kolo" is not liable for the loss of the Sampan occurring in the course of the unauthorized tow (R. 35).

5. That the District Court erred in holding and deciding that the Tug "Kolo" was solely liable for the full damage suffered by the libelant (R. 35).

6. That the District Court erred in holding and deciding that the Master of the Tug "Kolo" was negligent in cutting the towline on the Sampan "Tenyo Maru" and that said negligence was the sole cause of the loss of the sampan (R. 35-36).

7. That the District Court erred in holding there was no necessity for cutting the tow loose under the

circumstances and that in so doing the Master of the tug "Kolo" failed to exercise the degree of care and skill required of a tug master in open sea towage (R. 36).

8. That the District Court erred in not holding and deciding that the Master of the tug "Kolo" acted in a reasonable and prudent manner in cutting loose a tow which was awash; that he used his best judgment in cutting said towline to save the lives of those aboard the tow; that he used his best judgment in cutting said towline to save the lives of those aboard the tug "Kolo" and to save the tug "Kolo" itself; that the sampan "Tenyo Maru", being awash, could not be towed to safety; and that the course pursued by the Master of the tug "Kolo" was the best and most logical one to pursue under the circumstances; but that if he were guilty of fault, such fault consisted of a mere error of judgment, which was legally excusable under the circumstances of the case (R. 36).

9. That the District Court erred in not holding and deciding that the Master of the tug "Kolo" used proper seamanship at all times in attempting to save his vessel and the lives of his crew following the flooding of the sampan "Tenyo Maru" and if the course he followed to save his vessel and crew was erroneous, such course was legally excusable under the circumstances existing in the case (R. 36-37).

10. That the District Court erred in not holding and deciding that the loss of the sampan "Tenyo Maru" was caused by her unseaworthy condition,

which condition was known to the libelant-appellee at the time that the tow of the sampan "Tenyo Maru" was undertaken (R. 37).

11. That the District Court erred in not holding and deciding that the sampan "Tenyo Maru" could not have been towed to safety, her decks being awash and her compartments flooded in the Molokai Channel (R. 37).

12. That the District Court erred in not holding and deciding that no damages should be awarded against the tug "Kolo" for the loss of the sampan "Tenyo Maru" in the course of a tow either known by the libelant-appellee to be an unauthorized tow with respect to the owners of the tug or under circumstances where such knowledge was properly imputed to him (R. 37).

13. That the District Court erred in awarding to the libelant-appellee its final decree in the sum of $8,000.00 with interest and costs, and in not holding, deciding and decreeing that any damage sustained by the libelant as the result of the loss of the sampan "Tenyo Maru" was directly attributable to the unseaworthy condition of said sampan at the time she was delivered to the tug "Kolo" for tow to Honolulu, which unseaworthy condittion was known to the libelant and that at least one-half of the total damage resulting from the loss of the sampan "Tenyo Maru" should be awarded against the libelant-appellee (R. 37-38).

SUMMARY OF ARGUMENT.

1. A libel *in rem* may not be maintained in Admiralty against a tug on a cause of action sounding in tort arising out of a towage agreement entered into by the master of the tug without the authority of the owner of the tug, which lack of authority was known, or should have been known, by the libelant, owner of the tow.

2. The cutting of a tow line by a tug master does not constitute negligence as a matter of law, under circumstances where the towed vessel is rapidly sinking, appears to be on the verge of completely submerging, where only its bow projects above the water, and where the question as to whether it will sink depends upon the amount of buoyancy in its wooden structure, the safety of the crewmen of the tow and the tug would be jeopardized by a sudden foundering of the tow, and where the nearest point of land is some eight to ten miles away.

3. A tug and her master are not solely responsible for the loss of an unseaworthy tow, known to be such by her owner at the time the tow is undertaken, and where the tow is inadequately equipped for the voyage and where her captain failed to notify the tug that she was taking water in excess of the capacity of her pumps until a breakdown of the pumps occurred, and where her captain after leaving the vessel took no affirmative steps thereafter to save her.

ARGUMENT.

1. A LIBEL IN REM MAY NOT BE MAINTAINED IN ADMIRALTY AGAINST A TUG ON A CAUSE OF ACTION SOUNDING IN TORT ARISING OUT OF A TOWAGE AGREEMENT ENTERED INTO BY THE MASTER OF THE TUG WITHOUT THE AUTHORITY OF THE OWNER OF THE TUG, WHICH LACK OF AUTHORITY WAS KNOWN, OR SHOULD HAVE BEEN KNOWN, BY THE LIBELANT, OWNER OF THE TOW.

The trial Court found as a conclusion of law that negligent towage is a maritime tort, rendering the offending vessel liable *in rem* so long as it is in the hands of a person having lawful possession (R. 27). The Court also made oral findings of fact that the claimant had not authorized the tow from Kaunakakai to Honolulu. These oral findings leave open the question whether the master of the tug had ostensible or apparent authority to take the tow. The trial judge, believed the answer to that question immaterial in an *in rem* proceeding against the vessel (R. 282-283).

The appellant has assigned as error the Court's ruling in this regard, assignments numbered 1 to 4 and 12. These assigned errors are as follows:

> "1. That the District Court erred in rendering and entering its findings of fact and conclusions of law herein dated June 3, 1949;
>
> 2. That the District Court erred in rendering and entering its final decree herein dated June 3, 1949;
>
> 3. That the District Court erred in holding and deciding that the Tug 'Kolo' was liable in rem for the loss of the Sampan 'Tenyo Maru' under the facts of the case;

4. That the District Court erred in not holding and deciding that the Master of the Tug 'Kolo', being without authority to take the tow of the Sampan 'Tenyo Maru' and such lack of authority being known to the libelant-appellee, owner of the Sampan 'Tenyo Maru', or such knowledge being imputable to him, the Tug 'Kolo' is not liable for the loss of the Sampan occurring in the course of the unauthorized tow."

"12. That the District Court erred in not holding and deciding that no damages should be awarded against the Tug 'Kolo' for the loss of the Sampan 'Tenyo Maru' in the course of a tow either known by the libelant-appellee to be an unauthorized tow with respect to the owners of the tug or under circumstances where such knowledge was properly imputed to him." (R. 35, 37.)

The evidence upon which the appellant bases his contention that the appellee knew, or should have known, that the master of the tug had no authority to take the tow to Honolulu is: First, in the initial discussion of the removal of the sampan from the reef to Kaunakakai, which discussion was held in the claimant's office in Honolulu, the decision to lend assistance was made, not by the tug master, who according to the appellee was present at the conference (R. 76), but by the vice president and general manager of the appellant, who was contacted by telephone. Secondly, when the appellee in the port of Kaunakakai inquired of the master of the "Mahoe", the senior tug which was in charge of the salvage job on

the reef, concerning the cost of the removal, the master of the "Mahoe" told the appellee that the Honolulu office would give him that information (R. 227). Two telephone calls were had before any definite answer was received, and then only after contact was made with the general manager of the appellant (R. 228-230, 253-254, 217). Thirdly, after the sampan was docked at Kaunakakai, the senior tug master told the appellee that if towage to Honolulu were desired, he should call the Honolulu office (R. 244). The facts therefore on analysis clearly show that the appellee knew, or as a reasonable man should have known, that the tug master of the appellant had no authority to enter into towage contracts, to quote binding prices, etc., but that such contracts could be made only through the Honolulu office.

The reason the Court did not make this final determination, which is clear from the record, is that such determination was not necessary to the Court's theory of the case.

The legal problem presented herein is not a novel one in American jurisprudence, it having come before the Courts in startlingly analogous cases on three different occasions.

The first case is that of *"R. F. Cahill"* (D.C.S.D. N.Y.) 1878, Federal Cases No. 11,735, 9 Ben. 352. The original contract of towage in this case called for the tow of libelant's canal boat from New York to South Amboy and back. A limit line had been placed by the owner of the tug upon her and her

master, at 51st Street, New York City. On the return voyage, the owner of the tow asked the tug master to take the boat up to 57th Street, for which extra towage the owner promised to pay the tug master, said payment and deviation to be concealed from the tug owner. Between 51st and 57th Streets, the canal boat was struck and damaged by floating ice and sank in the river. A libel was brought against the tug for the loss. The Court denied relief, because the tug master had no authority to enter into this additional agreement, and such lack of authority was known to the owner of the tow.

The second case is that of the *"Andrew J. White"*, (D.C.E.D.N.Y.) 1901, 108 Fed. 685. The barkentine "Minnie" was tied up in a slip in Brooklyn, along with other vessels. The location was such that immediately behind her and between her and the fairway of the river were tow barks. On the other side of the slip a steamer was secured with a scow tied up along the beam of the steamer. The removal of the "Minnie" from the slip required operations in very close quarters and the exercise of special skill. As the Court states, "The passage was possible under very nice adjustments, if duly executed pursuant to careful precautions." The towage contract was made by the "Minnie" with the agent of the owner of the tug, the agreement being that the captain of the barkentine would have her hauled down to the mouth of the slip ready for the tug. At the appointed time, however, it was found that the "Minnie" had not been moved, whereupon the tug master undertook to tow

her from her then position out of the slip. In the process, the "Minnie" was damaged by collision with the scow. A libel brought against the tug was unsuccessful, the reasons assigned by the Court being as follows:

> "* * * Hence, the service on the part of the tug was not only gratuitous, but, to the knowledge of the parties immediately participating, it was done against the will of the owner. Undoubtedly, the fact that the service was gratuitous would not preclude liability in case of sufficiently negligent execution of the work; but, where the master of a tug undertakes a service known to him and to the master of the tow to be wrongful as regards the owner of the tug, the doctrine that the act of the master is binding upon the vessel should not be applied. The master speaks authoritatively in the absence of the owner. In this case, the owner had withdrawn that authority by stipulating with the captain of the barkentine that it should not be exercised. Hence the master of the tug was acting as the servant or helper of the captain of the vessel, gratuitously doing a duty which the latter person had undertaken to do as regards the owner of the tug, and wrongfully using his employer's tug in this service. Of course, it is to be considered that the master of the tug might prefer to pull the tow out of the slip rather than to await the slow process of her own crew working her out, but that does not meet the vital objection that he was doing a thing which he had no right to do. He knew this. The captain of the barkentine knew it, and had agreed that it should not be

> done. This court should not sustain the asserted rule that a captain of a vessel may make a specific contract for towage with the owner of a tug, which carefully excludes hauling from the slip on account of recognized danger, but the master of the tug, on arrival, may annul the provision for taking from the slip, and assume the risk thereof, which his employer has rejected, and which the captain of the tow assumed." (108 Fed. 685, 688.)

The third case is that of *"The Oceanica"* (1909), C.C.A. 2, 170 Fed. 893. Here a contract was made between the managers of the tow and the tug for towage to Buffalo, New York, the tow to assume all risks. The master of the tug, to oblige the owner of the tow, continued beyond Buffalo toward Tonawanda, New York. On the way down the Niagara River, beyond Buffalo, the tug broke its propeller and cut the tow line, which resulted in the tow being carried against a pier and becoming a total loss. The Court primarily concerns itself with the efficacy of a towage contract clause requiring tow to assume all risks. On rehearing, the Court states:

> "* * * If the master of the Oceanica to oblige the master of the barge towed the barge beyond Buffalo against his owners' orders, then neither the Oceanica nor her owners are liable because the owners of the barge knew that the contract was to tow simply to Buffalo."

(citing *"The R. F. Cahill"* and *"The Andrew J. White"*.) (p. 897.)

These are the only three American cases that have been found dealing with the problem of a non-authorized tow (with the exception of *"The Madison" v. Wells* (1851), 14 Mo. 360, and *Bates v. "The Madison"* (1853), 18 Mo. 99, both of which cases were decided with reference to a Missouri statute), and it is submitted that the rule of these cases should be followed and the tug "Kolo" released of liability.

It has long been recognized by the Admiralty Courts in this country that as a general proposition a vessel should answer for the torts of its master and crew, irrespective of the fault of the vessel's owner.

In 1812 John Marshall, sitting in the Circuit Court, allowed a vessel to be forfeited for a false report filed by its master, despite the owner's protest that the master had acted without authority. Allowing the forfeiture, Marshall personified the vessel, attributing the offense to it. *"The Little Charles"*, Fed. Cases No. 15,612.[1]

In 1834, Mr. Justice Ware, in *"The Phebe"* wrote a scholarly opinion on a shipper's right to a lien on a chartered vessel arising out of a contract made with the vessel's master, and found the vessel "bound in specie for the acts of the master" as a matter of maritime usage, 1 Ware 2nd Ed. 265, 270, subsequently followed in *"The China"*, 74 U.S. 53, wherein the vessel was held liable, over the protests of the

[1]It is to be observed that Marshall found the owner had authorized the master to make the report for the vessel, which report resulted in the forfeiture.

owner, for damages caused by the faults of a compulsory pilot.[2]

This doctrine has also been expressed and approved of by the Supreme Court in *United States v. "Brig Malek Adhel"*, 2 How. 210, 233, 234; *Ralli v. Troop*, 157 U.S. 386, 402, 403; *"The John G. Stevens"*, 170 U.S. 133, 120; *"The Barnstable"*, 181 U.S. 464, 467, and *Canadian Aviator Ltd., v. U. S.*, 324 U.S. 215, 224.

This animistic theory, which has not been accepted in England,[3] appears, according to Holmes,[4] to rest upon the primitive concept of deodand, and to others on the noxia dedetio principle of the Roman law,[5] either of which concept makes property liable for any loss occasioned by it, irrespective of the fault of the property's owner.

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[2]In England, which regards the in rem right against the ship as ancillary to the in personam right against the owner, Roscoe's Admiralty Practice, 5th Ed., Hutchinson, pp. 26-29, the owner is held personally responsible for the culpabilities of a compulsory pilot by statute, Pilotage Act 1913, 2 & 3, Geo. 5, C. 31, s. 15; in Canada, the pilots are considered agents of the owners and advisors of the masters, who retain control of the ship, 36 Victoria Can. C. 54, Bell Telephone Co. v. "The Rapid" (1897), Q.R. 12 S.C. 37; as they are under Dutch law, "Prins Hendrick" (1899), P. 177; French law, "The Augusta (1886), 6 A.A.P.M.C. 58, 161; the law of Belgium, "The Dallington" (1903), P. 77; the law on the Danube, "The Agnes Otto" (1887), 12 P.D. 56; and on the Suez, "The Guy Mannering" (1882), 7 P.D. 52, 132.

[3]It has been severely criticized in Marsden's Collisions at Sea (9th Ed. Gibb), p. 79, et seq.

[4]Primitive Notions in Modern Law, 10 A.L.R. 422, 432, et seq., The Common Law, 26-30.

[5]Judge Harrington Putnam, 17 A.L.R. 1, "The Liability of Shipowners for Masters' Faults".

That this theory cannot be absolutely applied in favor of a person injured, as against an offending vessel of an innocent owner, has been recognized. Thus, while in *"The Arturo"* this artificial doctrine of personification of the ship is logically followed to the conclusion that if pirates stole a ship, she would still, as an offending vessel, be liable for injuries to another, 6 Fed. 308, 313,[6] the Supreme Court in *"The Barnstable"* limited noxal liability to cases where the damage results from the operations of those lawfully in possession of the vessel, whether as owner or charterers, 181 U.S. 464, 467. While this limitation has not been otherwise spelled out judicially, it has received support. *Hughes on Admiralty,* 2nd Ed., p. 131.

In *"The Eugene F. Moran",* 212 U.S. 466, which involved a collision between a float under tow and a mud scow under another tow, it was urged that since a ship was liable *in rem* for the torts of a compulsory pilot according to *"The China",* a tow should be liable for the torts of the tug towing it, the liability or lack of liability of the owner of the tow being of no consequence. Holmes however refused to follow the principle of *"The China",* stating that while the doctrine of holding the ship personally responsible might make the vessel a wrongdoer, even though her owners are not culpable, the fiction surviving because of the convenient security thereby furnished, "* * * a fiction is not a satisfactory ground for taking one man's prop-

[6]Cited with approval in U.S. v. Certain Sub-freights Due "S.S. Neponset", 300 Fed. 981, 990.

erty to satisfy another man's wrong, and it should not be extended." 212 U.S. 466, 474. The *in rem* theory was consequently limited to cases where the mismanagement was by those aboard the offending vessel.

The personification doctrine has been limited in other respects by the Courts as the circumstances of the cases have required. Thus in *"The Joseph Vaccaro"*, 180 Fed. 272, the Federal District Court in Louisiana refused to permit a libel *in rem* to be brought by a pilots' association for damage incurred by the pilot boat as a result of a collision with a ship piloted by one of its members. In the *L.&W.B.C.Co. No. 11,* 53 Fed. Sup. 326, the District Court for the Eastern District of New York refused to entertain a libel *in rem* against a crane barge operated by a charterer for damage to the libelant's barge occurring in the unloading of stone blocks by the crane barge, which damage was due solely to the negligence of the employees of the charterer. Again the Second Circuit Court limited the doctrine of vessel personification in a case involving a collision between a convoy vessel and a nonconvoyed vessel. The ship of the convoy Commodore was impleaded on the theory of *in rem* liability for her master's failure to give proper instructions to the convoy. It was held the Commodore's fault was not imputable to his ship, *Publicover v. Alcoa Steamship Co., "The Lillian E. Kerr-The Alcoa Pilot"*, 168 Fed. (2d) 672.

The Supreme Court is also found to have refused to extend the doctrine in *"The Queen of the Pacific"*, 180 U. S. 49, where a limiting provision for the presenta-

tion of claims set up in a bill of lading was held to run in favor of both the ship and the owner and to bar a suit filed against the ship, even though the contract was entered into with the owner. The Court found the claim to be against the owner although the suit was filed against the ship.

The creation of maritime liens against vessels through the unauthorized acts of the master or crewmen entering into maritime contracts for repairs, supplies, or necessaries, has long been limited by statute in the United States. The Federal Maritime Lien Act of June 23, 1910 (36 Stat. 604), as amended by the Merchant Marine Act of June 5, 1920 (41 Stat. 1005, now contained in Title 46, U.S.C. Secs. 971-975) requires for a lien enforceable *in rem* against a ship that the services or supplies be furnished at the request of certain persons presumed to have authority to bind the ship and owner. No lien can arise, however, when the person furnishing the services knew, or by reasonable diligence could have ascertained, that the person ordering the services or supplies was without authority so to do. (Sec. 973 of Title 46).

This statute represents a limitation of the *in rem* theory of customary admiralty law, certainly as recognized in France, where it is presumed that necessaries are furnished on the credit of the vessel, unless it be shown that the materialmen trusted the person and not the thing. The *2 Emerigon, Traite de Assurances et des Contracts a la Grosse,* Bouloy, Paty Ed., Ch. XIII, Sec. 111, *3 Kent's Commentaries* (13th Ed.), p. 168,

The Young Mechanic, 2 Curt. 404, Fed. Cases No. 18,180.

While the libel herein does not involve an action *ex contractu,* but is delictual in nature, the background of the case is contractual. In this respect it differs from collision cases where one person's vessel is involuntarily thrust into contact with another's. Here the libelant voluntarily entered into the relationship with the tug with a full knowledge of substantially all the pertinent facts. He chose to entrust his sampan to the master of the "Kolo", under circumstances where he knew, or should have known, of the lack of authority of that master to take the tow to Honolulu. It is submitted that the case should not be resolved by a mechanistic application of delictual principles in complete disregard of the admiralty principles applicable in contract situations.

The *in rem* theory of personification of a ship is at best an artificial doctrine. The fact that under certain circumstances it takes one person's property to satisfy the wrong of some other person rests not upon justice, but only upon pragmatic grounds.[7] Its application should not be extended beyond adjudicated cases. The only decisions in this country involving unauthorized

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[7]Holmes says it is supported by an appearance of common sense which accounts for its survival. The ship is the only security available in dealing with foreigners, and the ease with which a foreign ship can be seized and made to pay for the wrong in lieu of the necessity of the injured citizen being required to go into a foreign court to secure redress against the owner, is appealing, The Common Law, p. 28. Of course this situation does not prevail here, where the owner can be sued as easily as the ship.

tows have exonerated the tugs from liability. In England, neither tug nor owner would be liable under these circumstances. It is therefore submitted that this Court should not go beyond the American and English authorities, and blindly apply an artificial doctrine, where the result would not only be eminently unfair and unjust, but would also do violence to common sense.

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2. THE CUTTING OF A TOW LINE BY A TUG MASTER DOES NOT CONSTITUTE NEGLIGENCE AS A MATTER OF LAW, UNDER CIRCUMSTANCES WHERE THE TOWED VESSEL IS RAPIDLY SINKING, APPEARS TO BE ON THE VERGE OF COMPLETELY SUBMERGING, WHERE ONLY ITS BOW PROJECTS ABOVE THE WATER, AND WHERE THE QUESTION AS TO WHETHER IT WILL SINK DEPENDS UPON THE AMOUNT OF BUOYANCY IN ITS WOODEN STRUCTURE, THE SAFETY OF THE CREWMEN OF THE TOW AND THE TUG WOULD BE JEOPARDIZED BY A SUDDEN FOUNDERING OF THE TOW, AND WHERE THE NEAREST POINT OF LAND IS SOME EIGHT TO TEN MILES AWAY.

This point is directed to the following assignments of error:

> "6. That the District Court erred in holding and deciding that the Master of the Tug 'Kolo' was negligent in cutting the towline on the Sampan 'Tenyo Maru' and that said negligence was the sole cause of the loss of the sampan.
>
> "7. That the District Court erred in holding there was no necessity for cutting the tow loose under the circumstances and that in so doing the Master of the Tug 'Kolo' failed to exercise the degree of care and skill required of a tug master in open sea towage.

"8. That the District Court erred in not holding and deciding that the Master of the Tug 'Kolo' acted in a reasonable and prudent manner in cutting loose a tow which was awash; that he used his best judgment in cutting said towline to save the lives of those aboard the tow; that he used his best judgment in cutting said towline to save the lives of those aboard the Tug 'Kolo' and to save the Tug 'Kolo' itself; that the Sampan 'Tenyo Maru', being awash, could not be towed to safety; and that the course pursued by the Master of the Tug 'Kolo' was the best and most logical one to pursue under the circumstances; but that if he were guilty of fault, such fault consisted of a mere error of judgment, which was legally excusable under the circumstances of the case.

"9. That the District Court erred in not holding and deciding that the Master of the Tug 'Kolo' used proper seamanship at all times in attempting to save his vessel and the lives of his crew following the flooding of the Sampan 'Tenyo Maru' and if the course he followed to save his vessel and crew was erroneous, such course was legally excusable under the circumstances existing in the case."

"11. That the District Court erred in not holding and deciding that the Sampan 'Tenyo Maru' could not have been towed to safety, her decks being awash and her compartments flooded in the Molokai Channel."

(R. 35-37.)

The sampan was grounded on a reef sometime on Saturday, April 3rd, 1948, and was removed in the

afternoon of Tuesday, April 6th (R. 76, 120). During that time she was beating upon a boulder, causing the boat to rock as each wave came in (R. 77-78). On her being freed and taken into port, a superficial inspection revealed a hole in her hull about one and a half feet long and three inches wide (R. 61). A closer examination of the soundness of her hull could not be made either from the inside or outside (R. 80, 121). At the time the tow was undertaken, the hole had not been successfully patched and the bottom was not strengthened (R. 54, 112), although the water, which at the time of docking had half filled her, had been pumped out so that she was relatively dry.

In this condition the tow was undertaken to Honolulu, a distance of some thirty miles, through open unsheltered water. The sampan had as a crew her captain and two deck hands who remained aboard to man the gasoline and hand pumps (R. 66). When some fifteen miles from Kaunakakai and in the channel between the Islands, the gasoline and hand pumps were unable to keep up with the water. No signal was given to the tug until the gasoline pump stopped working, at which time the captain of the sampan did give a signal (R. 68). The testimony of the captain of the sampan is somewhat confused as to whether the line was then cut, or whether hand pumping was continued for another half hour after the gasoline pump stopped before the tug was signaled and the line cut (R. 56, 68). At the time of severing of the line, according to the captain of the tow, the water was about up to the gunwales of the sampan (R. 56).

According to the master of the tug (a witness for the libelant, he no longer being in the employ of the appellant (R. 222-223)), the tug and tow were in the middle of the Molokai channel when the tug master, shortly after observing the tow riding normally, saw her to be under water aft of the bow, with the cabin completely submerged or substantially awash, and the men clinging to the submerged cabin. About four feet of the bow at that time was above water. At that point, upon the men on the tow signalling him to pick them up, the captain of the tug cut the tow line, and the men on the sampan dove in the water and were picked up by the tug (R. 124-125, 144). The tug thereafter left the scene with only four feet of the sampan's bow visible above the water. The sampan was never again seen or reported.

While at the pier at Kaunakakai, an unsuccessful attempt was made to pump the water from the sampan by using the tug's pump (R. 82, 111).

The evidence shows that a deck hand on the tug, whose testimony was refused as an expert, told the captain that he should not cut the line as he thought the sampan would not sink but would float (R. 150), and also over objection testified that he thought the tug master was a "bit scared" when he severed the tow line (R. 154).

The libelant offered an expert who testified that while sampans do not normally sink, a possibility of sinking could not be ruled out, and one case was known where a sampan completely submerged (R. 200-201).

An expert of the appellant testified that to determine whether a sampan in the condition described could be safely towed to land some eight to ten miles away, bouyancy factors would have to be known, which could only be ascertained accurately by tests made on the wood itself, and that while a new sampan in the then swamped condition of the "Tenyo Maru" would stay afloat, in a vessel of the age and characteristics of this one, the weight and buoyancy factors would lie very close one to the other, so that it would be a close question whether she would sink (R. 311-320, 324-327).

It was in this condition that the master of the tug cut the tow line.

The fundamental admiralty law is that the relationship of a tug and tow is such that a tug is not a common carrier nor bailor. It is not an insurer against damage to its tow. The towing vessel and her master are required to exercise only reasonable care and maritime skill under the circumstances. The burden is upon the libelant to establish that there was a failure on the part of the tug or her master to exercise the required care or skill, and that such failure resulted in loss. *Stevens v. "The White City"*, 285 U.S. 195, *Standard Oil Co. v. Ship Owners & Merchants Tugboat Co.*, 17 Fed. (2d) 366.

It is well established that in an emergency, negligence on the part of the tug or her master does not follow from a mere error in judgment. This principle has been stated by the Third Circuit Court of Appeals in *"The S.S. Bellatrix"*, 114 Fed. (2d) 1004, 1007:

> "Even if the pilot had not acted thus competently, the question of negligence would still be resolved in the light of the circumstances. At no time would he be required to choose the best way out and, when faced with an emergency, negligence does not follow from mere errors in judgment."

The Second Circuit Court has expressed the rule as follows:

> "It is true that a tug and her owner, while required to exercise good seamanship, are not liable for mere errors of judgment in difficult situations and are not required to 'do precisely what, after the event, others think may have been better.' "
>
> *The Stirling Tompkins,* 56 Fed. (2d) 740.

Holding to much the same effect is *Eastern Transportation Co. v. "The Nancy-Moran",* 78 F. Supp 646, wherein it is stated that there is a failure to exercise good judgment by the tug captain only if his conduct is outside the range of possible discretion and his error in judgment is gross and flagrant.

In order for the libelant to recover, there must be a showing of negligence on the part of the tug, that is, that the damage for which recovery is sought was caused by breach of duty imposed upon the towing vessel, *Stevens v. "The White City",* 285 U.S. 195, and *New Orleans Coal & Bisso Towboat Co. v. The United States,* 86 F. (2d) 53, *certiorari* denied, 300 U.S. 676, and evidence consistent with the hypothesis that a towing vessel is negligent and that it is not negligent does not establish liability for damage to the tow, *Stevens*

v. "The White City", supra. Consequently the foundering of a tow presents no presumption against the tug. *"The Benning",* 44 F. Supp. 645, and *Schuylkill Transportation Co. v. Banks,* C.C.A. 3, 152 F. (2d) 405.

Here the evidence shows that sampans do not generally, but do occasionally, sink. It shows that the sampan had been subjected to a pounding on the reef and that her bottom was visibly damaged. It shows that she sank rapidly from a relatively normal position to one where only four feet of her bow were above water. It shows the pump of the tug could not be used to pump out the sampan. It shows that the crewmen of the tow were precariously clinging to the submerged cabin at the time the line was cut. It shows that the submergence of the sampan with a line to the tug would endanger the tub if the line should not be directly astern of the tug, but should be on her quarter or beam. It shows that the ultimate question as to whether the tug would sink to a completely submerged position depends upon the buoyancy of the wood in her structure, something not ascertainable by mere observation. It shows the positive buoyancy factor of the tug, if existent, was slight. The evidence does not show, however, that the line having been cut to permit the tug to circle about to pick up the crew members from the hulk, it could have been with safety restored to the sampan and the tow resumed. It does not show that the sampan did in fact remain afloat for five minutes after the tug left her, or for five hours thereafter, or for any other length of time. It does show

that the master and crew of the sampan signalled to be taken off her and aboard the tug. It does not show that the master of the tow when taken aboard the tug protested either against the cutting of the line or the abandonment of his ship, although the master of the tow appeared as a witness. It does not show that the master of the sampan was of the opinion that his vessel could be towed to land. *"The Asher J. Hudson"*, C.C.A. 2, 154 Fed. 354.

It is submitted that the finding of the Court below that the cutting of the line constituted negligence on the part of the master is, in the light of all of the facts and circumstances, a clearly erroneous finding, and this appeal in admiralty being a trial *de novo,* the trial Court's findings must be set aside as they are clearly contrary to the preponderance of the evidence, *Drain v. Shipowners and Merchants Towboat Co.,* 149 F. (2d) 845, C.C.A. 9.

It is submitted that it was the duty of the tug master to pick up the crew members of the tow, when their lives were in jeopardy because of the vessel sinking under them. It certainly cannot be stated that the tug master had no duty toward them or that any such obligation is to be subordinated to his responsibilities to a sinking vessel. It is submitted that his conduct in this respect was not negligent and that it did not even consist of an error of judgment.

Once the tow line had been cut, it appears clearly from the evidence that the tug was unable to render assistance to the tow, at least to the extent of lightening her in the water and preventing her further sink-

ing. Where such is the fact, it has been held that there is no negligence on the part of the tug in abandoning its tow. *"The Brilliant"*, 64 F. Supp. 612.

In this case, in the absence of evidence that the tug, after the line had been cut and the men rescued, could have with safety put a tow line on the sampan, resumed the tow and brought her eight to ten miles to the nearest point of land, and in the absence of any evidence that if such conditions did exist that they were known or should have been known to an average tug master, it is submitted that as a matter of law there is no negligence on the part of the captain of the tug in abandoning the tow. There is no evidence to show that the tug master knew that the tow had been overhauled in 1946 and had been serviced in boat yards periodically thereafter. There is no evidence to show that he knew or should have known of the buoyancy of the wood in the vessel.

It is submitted that the fact that the tow might have been prematurely abandoned cannot be considered other than as an error of judgment on the part of the tug master, and that such error of judgment would not constitute negligence in the absence of a showing that the sampan did stay afloat for a time after abandonment sufficient to have permitted her being towed to shore. This showing has not been made.

Consequently the tug "Kolo" should not be held responsible for the loss of the sampan.

3. **A TUG AND HER MASTER ARE NOT SOLELY RESPONSIBLE FOR THE LOSS OF AN UNSEAWORTHY TOW, KNOWN TO BE SUCH BY HER OWNER AT THE TIME THE TOW IS UNDERTAKEN, AND WHERE THE TOW IS INADEQUATELY EQUIPPED FOR THE VOYAGE AND WHERE HER CAPTAIN FAILED TO NOTIFY THE TUG THAT SHE WAS TAKING WATER IN EXCESS OF THE CAPACITY OF HER PUMPS UNTIL A BREAKDOWN OF THE PUMPS OCCURRED, AND WHERE HER CAPTAIN AFTER LEAVING THE VESSEL TOOK NO AFFIRMATIVE STEPS THEREAFTER TO SAVE HER.**

This point in the argument is attributed to the following assignments of error:

> "5. That the District Court erred in holding and deciding that the Tug 'Kolo' was solely liable for the full damage suffered by the libelant."
>
> "10. That the District Court erred in not holding and deciding that the loss of the Sampan 'Tenyo Maru' was caused by her unseaworthy condition, which condition was known to the libelant-appellee at the time that the tow of the Sampan 'Tenyo Maru' was undertaken."
>
> "13. That the District Court erred in awarding to the libelant-appellee its final decree in the sum of $8,000.00 with interest and costs, and in not holding, deciding and decreeing that any damage sustained by the libelant as the result of the loss of the Sampan 'Tenyo Maru' was directly attributable to the unseaworthy condition of said sampan at the time she was delivered to the Tug 'Kolo' for tow to Honolulu, which unseaworthy condition was known to the libelant and that at least one-half of the total damage resulting from the loss of the Sampan 'Tenyo Maru' should be awarded against the libelant-appellee."
>
> (R. 35, 37-38.)

It is clear from the evidence and found by the Trial Court that both the owner of the tow and the master of the tug were aware that the sampan was unseaworthy at the time the tow was undertaken (R. 26). The evidence also shows that due to this unseaworthy condition, the sampan took on more water than the pumps could handle, and that she lowered in the water until her decks were awash, her cabin partly inundated, and only three or four feet of her bow above water, at which time she was abandoned (R. 56-57, 66-69, 123-125, 142-145). The testimony of the master of the sampan shows that the gasoline pump, which was situated on the open deck, stopped working when the spray affected it, the pump being inadequately protected from the spray by a small piece of canvas (R. 72-73), that prior to the gasoline pump becoming inoperative, water was taken into the ship faster than the pump could handle it, that no signal was given to the tug of this condition until after the gasoline pump became inoperative and only the hand pump was being used (R. 68-69). Subsequently, when the crew signalled to the tug that they be removed from the tow (R. 143), the tug cut the line, proceeded back, and picked up the crewmen who had jumped into the sea, and thereafter left the scene. No testimony was elicited from the master of the tow indicating that he either protested the cutting of the line or abandonment of the tow, or took any further steps to save his vessel. From his silence it may be inferred that he felt that no assistance could be rendered the sampan and that she should be abandoned in her sinking condition.

In many cases where similar factors have existed, the Courts have found that the loss of a tow has been the responsibility of both the tug and the tow. Thus the fact that an unseaworthy vessel has been taken in tow, and its condition known to both the tug and the tow, its subsequent loss has been held the joint responsibility of both vessels, and damages have been halved. *Mason v. The Steam-Tug "William Murtaugh"*, 3 Fed. 404; *"The Bordentown"*, 16 Fed. 270; *"The Syracuse"*, 18 Fed. 828, and *Dady v. Bacon*, 133 Fed. 986. Under this well-established law of damages in admiralty, it would seem that the damages herein, if it is found that the master of the tug was negligent, should be halved, because the negligence of the owner of the tow brought about her loss.

In addition, however, the fact that no notice was given to the tug that the tow was taking water in larger amounts than the pumps could handle, is evidence of negligence on the part of the tow, and it has been recognized that this form of negligence is sufficient to cause the damages to be divided, where negligence of the tug also contributed to the loss.

As illustrative of this principle is the case of *"Coleraine"-"The Nellie Tracy"*, 179 Fed. 977, wherein it was found that the tugs were negligent in failing to keep a proper lookout, and the tow that was lost was likewise negligent in that her captain made no attempt to signal the tugs when the conditions of the wind and weather adversely affected the tow. As the Court states with regard to the fault of the tow:

"While no duty rested upon the other captains to perform any service with reference to the boat Virginia E., nevertheless these captains owed it to the tug, which was doing the towing, to warn it in time of any mishap to the tow; and their evident hesitation in disturbing the tug, and their participation in the idea which the captain of the Virginia E. seems to have had, that he had nothing to do except to wait until arrival at his destination, is more or less instructive in showing the relations existing between the crews of the tugs and the men upon the barges, and indicates that these barge captains should be shown that some responsibility rests upon them. The captain of the Virginia E. might not have been able to put all of the hatch covers across the large cockpit to his barge, and he might have been entirely unable to interpose any obstruction to the sweep of the waves along the deck; but, if that were the case, he should immediately have attempted to warn the tug. The evidence shows plainly that a long time elapsed, in which he not only did nothing, whether useful or otherwise, to keep the water out of his boat, but also did nothing in the way of attracting the attention of the tugs. Under such circumstances, the tugboats and the barge should be held responsible for the loss." (179 Fed. 977, 978.)

The decision was affirmed by the Second Circuit in 185 Fed. 1006.

In *"The Robert H. Cook"*, 207 Fed. 626, it was found that both the tug and the tow were liable for the loss of the tow, the tug being negligent in setting a course such as it did, the condition of the weather

being what it was, and the tow was held negligent for failing to notify the master of the tug of her leaking condition. As the Court states:

> "After the collision and increased leaking it was his duty (i.e., the master of the tow) at once to notify the captain of the tug of her *actual* condition, which, on his own evidence, he did not do, and to keep a constant all night watch, as they were going out into deeper and broader waters in a very dark night and with increasing wind which rocked or tumbled the boat and made a heavy sea. There is a grave suspicion that the master of 'The Grube' (the tow) did not care whether she sunk or swam, survived or perished, so long as he himself survived. At best he was lazily indifferent." (Parentheses added.)

It is submitted that the failure of the master of the sampan to notify the captain of the tug as soon as the vessel took water in greater amounts than the pumps could handle, and the delay in signaling until such time that the vessel was "in extremis", constituted negligence on the part of the sampan which contributed to its loss. On this ground alone the damages should be halved in the event that the tug should be held negligent in the loss of the tow.

In this case the facts are somewhat analogous to those found in *"The Delta"*, 125 Fed. 133, where a tug towed a stranded vessel, to which was lashed a scow pumping her, from a reef. Upon being freed, the suction pump burst, causing the damaged vessel to take in water in large amounts. Instructions were shouted to the tug to take her in fast because she

was sinking. The resultant increase in speed by the tug caused the scow to ship water and to sink. It was held that the tug was liable for proceeding at an excessive rate of speed, and the scow was equally at fault by participating in the hails which resulted in the increased speed. The fact that attempts were thereafter made to inform the tug to reduce her speed did not change the result of apportioned damages.

Also holding that there is an affirmative duty upon a tow to inform the tug of its conditions when its safety is endangered, the failure of which places liability upon the tow, is *"The Gypsum King"*, 279 Fed. 297, and *"The Vale Royal"*, 51 F. Supp. 412.

There is also a further duty recognized in Admiralty law upon a person whose vessel has been damaged to take affirmative steps thereafter to limit the damage, and a failure so to do will result in a limitation of recovery to the value of the vessel prior to the time when such steps should have been taken. This principle has been set out in the case of *"The Baltimore" v. Rowland,* 8 Wall. 377, a collision case involving the sinking of a vessel. It was brought out in the trial that the vessel could have been raised and floated by the owners, but they failed to do so. The Court held that the owners were negligent in that respect, and found that recovery could not be had for the full value of the vessel and the cargo. The Court states:

> "Owners of vessels seeking redress in such cases must be prepared to show, not only that those in charge of the other vessel were at fault,

> but that no negligence on their part has increased or aggravated the injury. Damages are awarded in such cases for the injury done to the vessel and cargo by a wrongful act, but if the party suffering the injury to his property will not employ any reasonable measures to stop the progress of the damage, but wilfully and obstinately, or through gross negligence, suffers the damage to augment, it is his own folly, and the law will not afford him any redress for such part of the damage as proceeded directly from his own culpable default." (8 Wall. 377, 387.)

It was contended by the libelant herein, and found by the Court below, that the cutting of the tow line was due to the inexperience of the tug master and his failure to appreciate the fact that a sampan in such circumstances might have been safely towed ashore. While the appellant does not agree with this conclusion, if for the sake of argument it should be admitted as true, then it is submitted that the affirmative duty rested upon the master of the sampan, who, having spent three years as captain of her, and presumably was well acquainted with the vessel, to protest to the master of the tug against the cutting of the line and of her abandonment. It was the duty of the captain of the sampan to explain to the inexperienced tug master what the buoyancy factors were such as would permit her safe towage to land. The record is silent as to any such protest on his part or as to his taking any affirmative action to save his vessel. It is submitted that either in his opinion the sampan could have been towed to port or in his opinion it could

not have been towed into port. If his opinion was actually the former, then there was an affirmative duty upon him to insist that the tow be resumed. The failure on the part of the libelant to prove that any steps were taken to save the vessel at that point should at least result in a halving of the damages. If it was the opinion of the master of the sampan that the vessel could not be safely towed to land, then it is submitted that there was no negligence on the part of the master of the tug in cutting the line and in abandoning the vessel. Under these circumstances, no liability should be imposed upon the tug.

It is therefore urged that, if the tug "Kolo" was negligent in cutting the tow line and abandoning the tow, there was negligence on the part of the tow which contributed to the loss, and consequently the tug is not solely responsible in damages but the damages should be halved.

CONCLUSION.

It is, therefore, respectfully submitted that:

1. A libel *in rem* may not be maintained in Admiralty against a tug on a cause of action sounding in tort arising out of a towage agreement entered into by the master of the tug without the authority of the owner of the tug, which lack of authority was known, or should have been known, by the libelant, owner of the tow.

2. The cutting of a tow line by a tug master does not constitute negligence as a matter of law, under

circumstances where the towed vessel is rapidly sinking, appears to be on the verge of completely submerging, where only its bow projects above the water, and where the question as to whether it will sink depends upon the amount of buoyance in its wooden structure, the safety of the crewmen of the tow and the tug would be jeopardized by a sudden foundering of the tow, and where the nearest point of land is some eight to ten miles away.

3. A tug and her master are not solely responsible for the loss of an unseaworthy tow, known to be such by her owner at the time the tow is undertaken, and where the tow is inadequately equipped for the voyage and where her captain failed to notify the tug that she was taking water in excess of the capacity of her pumps until a breakdown of the pumps occurred, and where her captain after leaving the vessel took no affirmative steps thereafter to save her.

Dated, Honolulu, T. H., this 4th day of January, 1950.

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Of Counsel.